

The potential of broadcasting and the failure of the original agreements to delineate respective corporate rights in relation to this new frontier prompted controversy over which corporation or corporations would control broadcasting. AT&T quickly exploited this ambiguity by establishing its proprietary interest.²¹⁸ RCA reacted predictably to AT&T's efforts to occupy the field, challenging it legally through the arbitration clause of their original agreement.²¹⁹ After considerable litigation, the parties to the original agreement negotiated a new agreement in 1926 to replace their outmoded 1920 agreement.²²⁰ The new agreement set out the fields of interest more clearly, specifically in relation to the phenomenon of broadcast radio. In essence, AT&T conceded broadcasting to RCA in return for greater dominance in point-to-point communications.²²¹

The explosion of radio broadcasting in the 1920s also forced the government to restructure its regulatory scheme concerning wireless communications. The Radio Act of 1912 was primarily directed at maritime use, although its language was broad enough to encompass all radio. In substance, the act required that radio users be licensed by the Secretary of Commerce.²²² And although the statute authorized the Secretary to specify the wavelength, it undercut the practical significance of such discretion in licensing by also allowing a station, at its own election, to use wavelengths other than those designated by the Secretary.²²³ In 1912, this sort of free-roaming license created few problems. Chatter on the ether was confined largely to marine and amateur use, and enough channels were available to prevent against undue interference among these radio

218. POOL, *supra* note 88, at 34-35.

219. BROCK, *supra* note 197, at 169.

220. *Id.*

221. *Id.*

222. DAVIS, *supra* note 49, at 40.

223. *Id.*

users.²²⁴

The emergence of broadcasting in 1921 radically changed the occupancy of the ether. Applications for licenses multiplied. Without any statutory authority to provide specified wavelengths for broadcasting, and despite the need to provide such channels to avoid interference among the various services, the Secretary of Commerce selected two bands—360 meters, and later 400 meters—as sufficient for broadcasting’s purposes.²²⁵ No effort was made to assign separate channels for each station.²²⁶ This simplistic method of assigning spectrum resources for radio broadcasting soon became severely out-moded.

In response to the exploding phenomenon of radio broadcasting, Secretary of Commerce Herbert Hoover called a conference on radio telephony to generate a legislative response to the problems presented by broadcasting.²²⁷ The first conference met in February 1922 and produced a report containing a variety of recommendations for radio licensing.²²⁸ The report did not address foreign ownership, but instead focused on whether the electromagnetic spectrum was a public resource that should be regulated by the government. Hoover held successive conferences over the next three years that addressed the same issue and each time advocated the same policy—namely, that the ether, as a “public medium,” should be strictly regulated by the federal government.²²⁹ Each year, Congress rebuffed the

224. *Id.*

225. *Id.*

226. *Id.*

227. EMORD, *supra* note 3, at 147 (citing MINUTES OF OPEN MEETINGS OF THE DEPARTMENT OF COMMERCE CONFERENCE ON RADIO TELEPHONY (Feb. 27-28, 1922)).

228. *Id.*

229. PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE AND RECOMMENDATIONS FOR REGULATION OF RADIO, CONFERENCE CALLED BY HERBERT HOOVER, SECRETARY OF COMMERCE, WASHINGTON, D.C. 7 (Nov. 9-11, 1925) [hereinafter *FOURTH NATIONAL RADIO CONFERENCE*].

recommendations.²³⁰

During this period, broadcasting was growing so rapidly that by 1923 several hundred stations were already vying to be heard on the two wavelengths assigned for nationwide use.²³¹ Interference among broadcasters became so pervasive that in the resulting confusion the stations effectively cancelled each other out. Also in 1923, the U.S. Court of Appeals for the D.C. Circuit ruled in *Hoover v. Intercity Radio Company* that, under the Radio Act of 1912, the Secretary's licensing powers did not include the discretion to withhold licenses, even on the grounds of preventing interference.²³² The Secretary's only discretionary power lay "in selecting a wavelength, within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference."²³³ To exercise this power, the court continued, the Secretary would first have to devise an effective frequency allocation scheme that avoided the pitfall of interference.²³⁴

It was a task that must have seemed beyond the ability of the Secretary and his beleaguered Commerce Department. By 1924, the Department all but conceded that it was helpless in the face of this new phenomenon, unable to gauge either broadcasting's market or its potential:

The broadcast listener is an unknown quantity. Dependable figures indicating the number of persons deriving pleasure and benefit from this new and fascinating service can not be furnished. Its effect can not be forecast, nor its value estimated. An accurate expression of its views is unobtainable.²³⁵

230. EMORD, *supra* note 3, at 152.

231. DAVIS, *supra* note 49, at 40.

232. 286 F. 1003, 1007 (D.C. Cir. 1923).

233. *Id.*

234. *Id.* at 1005-06.

235. COMMISSIONER OF NAVIGATION, 1924 ANNUAL REPORT TO THE

Charged by the D.C. Circuit to construct a regulatory framework by which to assign radio frequencies in a noninterfering manner, Secretary Hoover resorted again to his radio conferences to devise a solution.²³⁶

Hoover's fourth radio conference in 1925 again concluded that radio required new comprehensive legislation to ensure adequate regulatory control.²³⁷ The changing nature of radio presented an increasing number of issues (ranging from the financial qualifications for licensees to the protection of broadcast rights) that exceeded the regulatory reach of the Radio Act of 1912.²³⁸ In 1926, an Illinois federal court reinforced this conclusion when it ruled in *United States v. Zenith Radio Corp.* that, while the 1912 statute gave the Secretary of Commerce discretion to assign licenses, it did not authorize him to devise a new regulatory scheme by which to exercise that power.²³⁹ Without any prescribed legislative standard, the court reasoned, the Secretary's design of such a scheme would not be discretionary but arbitrary.²⁴⁰ Consequently, Secretary Hoover abandoned all efforts to instill order in the airwaves and confined the Commerce Department's role to that of a registration bureau.²⁴¹

The conventional wisdom is that the *Zenith* decision plunged the ether into chaos. Radio became a Leviathan struggle of all against all. New stations erupted into the ether on frequencies selected capriciously. Existing stations surfed the ether in search of clean air, each modulating broadcast frequen-

SECRETARY OF COMMERCE 22 (1924).

236. PAGLIN, *supra* note 51, at 9.

237. *Id.* (citing FOURTH NATIONAL RADIO CONFERENCE, *supra* note 229, at 8-9).

238. *Id.* at 10.

239. 12 F.2d 614 (N.D. Ill. 1926).

240. *Id.* at 618.

241. PAGLIN, *supra* note 51, at 9.

cy, power, and times to make themselves heard above the din.

Though Congress had flirted for several years with bills to strengthen regulatory control over the airwaves, the tumult in 1926 and the resultant public dissatisfaction demanded the legislature's greater attention. After years of resisting government regulation of radio, Congress, it is commonly believed, had to act to reverse the intolerable levels of interference produced by an absence of regulation. In his message to Congress on December 7, 1926, President Coolidge called for new legislation to regulate radio:

Due to the decision of the courts, the authority of the department under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wavelengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I must urgently recommend that this legislation should be speedily enacted.²⁴²

Congress responded by passing the Radio Act of 1927, which implemented a new regulatory framework for radio.

FABRICATED CHAOS?

An alternative theory of the enactment of the Radio Act of 1927, propounded by economist Thomas Hazlett, is that the

242. Message to Congress (Dec. 7, 1926), *reprinted in* __ A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS __, *and quoted in* DAVIS, *supra* note 49, at 54.

interference problems of the mid-1920s did not reflect market failure, but rather the conscious decision of government officials to prevent the emergence of an efficient market for rights in radio propagation.²⁴³ Hazlett asserts that Secretary Hoover's Commerce Department precipitated the chaos because it wished to retain control over radio as a "public medium," and the emerging broadcast industry saw that the new legislation would shield existing licensees from further competition. During the debate of the Radio Act of 1927, Senator Key Pittman of Nevada claimed that private parties lobbying for the bill exacerbated the interference problem to secure monopoly protection to be afforded by the legislation:

Why was it that just recently broadcasting concerns of the West all changed their wave lengths, sometimes a hundred degrees, to have them conflict, and on the next day said, "If you do not pass this bill, you will have the same condition for another year"? Mr. President, I do not believe that I am naturally suspicious, but . . . [this] bill is fair to only one institution. It is fair to the monopoly that will be created under it. The monopoly that may be created under it is practically free of control.²⁴⁴

Hazlett argues that the spectrum was functioning properly under Hoover's licensing policies until 1926, and that property rights in the spectrum were well defined, freely alienable, and largely secure.²⁴⁵ Congress therefore fully understood in 1927 that a system of property rights in the broadcast spectrum was

243. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 145 (1990).

244. 63 CONG. REC. 4111 (1927).

245. Hazlett, *supra* note 243, at 143-47.

feasible.²⁴⁶ Congress chose, however, to allocate spectrum through a political process rather than through markets, and it restricted competition by limiting the supply of frequencies available for radio broadcasting below the level then technically feasible.²⁴⁷ Moreover, this federal regulation, which expressly preempted state law, was enacted three months after an Illinois court in November 1926 recognized a broadcaster's common law property right to eject trespassers, by force of injunction, from the frequency on which it operated.²⁴⁸ Secretary Hoover feared that such rights would become vested and escape government content controls, an objective that dominated his radio conferences and directed their initiatives for government regulation of the airwaves. Hazlett argues that, after Hoover was continually rebuffed by Congress in his efforts to impose greater regulatory controls on the spectrum, he undermined the existing regulatory structure to produce chaos in the spectrum and thus force Congress' hand.

At first, Hoover responded to Congress' indifference by trying to establish content controls through his own office's powers. According to Hazlett, Hoover obtained an understanding from the broadcast industry's leaders to accept content controls in return for restrictions on new market entrants.²⁴⁹ Consequently, Hoover refused from November 1925 to April 1926 to issue any more licenses.²⁵⁰ In April 1926, the *Zenith* decision denied the Secretary of Commerce any discretion to regulate the airwaves in a manner not specified in the Radio Act

246. *Id.* at 158–63.

247. *Id.* at 152–58.

248. This case, *Tribune Co. v. Oak Leaves Broadcasting Station* (Cir. Ct., Cook County, Ill., Nov. 17, 1926), appears to be publicly available today only in the *Congressional Record*, where it was inserted in its entirety several weeks after being handed down. 68 CONG. REC. 216, 219 (1926). For a discussion of *Oak Leaves*, see Hazlett, *supra* note 243, at 149–52.

249. *Id.* at 152–54.

250. *Id.*

of 1927,²⁵¹ and, at Hoover's request, Acting Attorney General William Donovan confirmed the correctness of the court's ruling.²⁵²

Hoover then abandoned all attempts at regulation, provoking a crisis aimed at precipitating congressional action. Hoover, Hazlett wrote, "saw his *Zenith* 'defeat' and the ensuing confusion, which he had predicted, as a predicate to achieving his foreign policy agenda."²⁵³ The gambit proved successful. Chaos ensued, as expected, and forced Congress to enact, in the Radio Act of 1927, the comprehensive federal regulatory controls which Hoover had long sought.

If Hazlett's theory is correct, then Congress in 1927 enacted the most intrusive regulatory controls to that time imposed on the use of spectrum not in response to genuine market failure, but in response to conscious efforts by the federal government to prevent a market from functioning. Those controls continue to exist today in only slightly altered form through the Communications Act of 1934 and its amendments. "The entrusting to federal regulators of power over life and death of American broadcasters slipped through Congress and remains public policy today," Hazlett argues, "due to a fundamental misunderstanding."²⁵⁴

The period of broadcast cacophony had several implications for the regulation of foreign direct investment. First, it was clear that the Navy had lost its battle to deny the private sector control over wireless. The enormous growth in sales of home radios during the mid-1920s had created a permanent constituency of household listeners that would oppose any government takeover of the radio industry in peacetime. Second, the Navy's interest in restricting foreign ownership of wireless was completely compatible with Secretary Hoover's

251. *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

252. 35 OP. ATT'Y GEN. 126 (1926).

253. Hazlett, *supra* note 244, at 159.

254. *Id.* at 141-42.

goal of creating a government body to limit access to radio and influence its content. Indeed, the same pervasiveness and popularity of radio broadcasting that motivated Hoover to regulate also bolstered the Navy's claim, previously rather flimsy, that foreigners could disseminate propaganda by radio. Before the early 1920s, propagandists would have to settle for an audience of amateur radio operators tuning in almost randomly with rather crude receivers. (And, in any event, the radio propaganda in 1917 or 1927 could just as easily emanate from Berlin or Moscow by short wave and thus fail to implicate the foreign ownership of U.S. wireless stations in *any* respect.) Likewise, Hoover would be content to restrict foreign investment as the Navy wished, because the reciprocal flows of benefits—from the regulator to the regulated, and vice versa—upon which his scheme of regulation was predicated would function more smoothly if the economic benefits of regulating a radio licensee could be prevented from spilling over to owners in another country. Indeed, by 1995 broadcasters would be so comfy with their regulatory bargain that they would show no interest whatsoever in being covered by proposals to liberalize the foreign ownership restrictions.

THE FOREIGN OWNERSHIP RESTRICTIONS IN THE RADIO ACT OF 1927

The foreign ownership restrictions contained in the Radio Act of 1927 originated in the early efforts to reform the Radio Act of 1912. In 1922, Representative Wallace H. White, Jr., a Republican from Maine and a participant in Hoover's conferences, introduced a bill to amend the Radio Act of 1912.²⁵⁵ The bill provided that no license was to be granted or transferred to any alien or his representative, a foreign government or its

255. H.R. 11964, 67th Cong., 2d Sess. (1922); *Hearings on H.R. 11964 Before the House Comm. on Merchant Marine and Fisheries*, 67th Cong., 2d Sess. 2 (1922) [hereinafter *H.R. 11964 Hearings*].

representative, a company organized under the laws of a foreign government, a company of which any officer or director was an alien, or a company one-fifth or more of whose voting stock was owned or controlled by such persons or entities.²⁵⁶

Though unsuccessful, Representative White's 1922 bill contained language restricting foreign ownership of wireless entities in the U.S that would become the blueprint for the restrictions ultimately incorporated into section 12 of the Radio Act of 1927, which provided, among other things, that:

The station license required hereby shall not be granted to, or after the granting thereof of such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign company.²⁵⁷

The legislative history gives little indication why Congress broadened the alien ownership restrictions. The paucity of evidence probably reflects the fact that Congress's major concern when enacting the Radio Act of 1927 was to end the chaos thought to have been created by the inadequacy of the

256. H.R. 11964, § 2(B), 67th Cong., 2d Sess. (1922).

257. Radio Act of 1927, ch. 169, § 12, 44 Stat. 1162 (1927).

Radio Act of 1912 to address the competing demands for spectrum created by the growth of broadcasting.²⁵⁸ The legislative history that does exist emphasizes two principal purposes for the foreign ownership restrictions.

First, the foreign ownership restrictions were explained as an attempt to eliminate loopholes in the then-existing law, particularly as to domestic corporations controlled from abroad, and to render the new legislation consistent with the policies of other nations and with U.S. navigation law.²⁵⁹ Second, the foreign ownership restrictions were considered a method to prevent alien activities against the U.S. in time of war. In a letter to Senator Couzens of Michigan dated March 22, 1932, chairman of the Senate Interstate Commerce Committee, Secretary of the Navy Charles Adams wrote: "The lessons that the United States had learned from the foreign dominance of the cables and the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the [First World] War brought about passage of the Radio Act of 1927, which was intended to preclude any foreign dominance in American radio"²⁶⁰

Many in Congress, however, doubted the need for foreign ownership restrictions. During debate on the 1927 bill, Senator Burton Wheeler—a Democrat from Montana who had been Robert La Follette's running mate on the Progressive ticket in 1924²⁶¹—noted that section 12 was "based, presumably, upon the idea of preventing alien activities during time of

258. DAVIS, *supra* note 49, at 79.

259. *See, e.g.*, 64 CONG. REC. 2332 (1923) (statement of Rep. White); 62 CONG. REC. 8400 (1922) (memorandum accompanying S. 3694 upon its introduction); *To Regulate Radio Communication: Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine and Fisheries*, 69th Cong., 1st Sess. 23-24 (1926) (statement of Rep. White).

260. *Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 26 (1934) [hereinafter *H.R. 8301 Hearings*].

261. BIOGRAPHICAL DICTIONARY, *supra* note 71, at 1904.

war.”²⁶² He argued that such restrictions were “unnecessary, as the war clauses gave the solution by granting power [to the President to seize all radio stations in time or threat of war].”²⁶³ Although Senator Wheeler’s view failed to prevail, he drew attention to a fundamental weakness in the logic undergirding foreign ownership restrictions: The existence of the greater power, under section 2 of the Radio Act of 1912, to seize radio stations “in time of war or public peril or disaster”²⁶⁴ cast serious doubt on the need, on national security grounds, for the creation in 1927 of the lesser power to restrict foreign ownership of wireless.

Congress, however, believed the national security interests involved to be sufficient to require heightened safeguards to protect the airwaves from foreign influence. Because nationalization was an unpalatable option, foreign ownership restrictions provided a convenient means to ensure domestic control of radio stations in the U.S.; domestic control, in turn, conveyed the reasonable expectation that licensees would cooperate with the government during international conflicts.²⁶⁵

It is unclear whether the foreign ownership restrictions in the Radio Act of 1927 were originally conceived to apply to broadcasting. The Navy officer most responsible for passage of the restrictions, Captain Stanford Hooper, expressed little interest in the broadcast use of radio when testifying before Congress following enactment of the new legislation.²⁶⁶ The Navy’s concern was control of radio for international communications. Hooper believed that radio broadcasting should be

262. 68 CONG. REC. 3037 (1927).

263. *Id.*

264. 37 Stat. 302, § 2 (1912).

265. James G. Ennis & David N. Roberts, *Foreign Ownership in U.S. Communications Industry: The Impact of Section 310*, 19 INT’L BUS. LAW. 243, 244 (1991).

266. *Commission on Communications: Hearings on S. 6 Before the Sen. Comm. on Interstate Commerce*, 71st Cong., 1st Sess. 328–31 (1929) (statement of Captain Stanford C. Hooper).

administered by the newly created Federal Radio Commission because each zone of the U.S. had individual interests, but that international communications were a matter of national concern that the Navy Department could most efficiently administer.²⁶⁷

THE LOOPHOLE IN THE RADIO ACT OF 1927

After Congress enacted the Radio Act of 1927, a controversy arose over licensees who complied with the statutory requirements for aliens but were controlled by large corporations upon which no limitations were imposed. This loophole allowed holding companies to circumvent the foreign ownership restrictions by using American owned and directed subsidiaries. Faced with this loophole, Congress made repeated efforts to tighten the restrictions to effect section 12's purpose.²⁶⁸

The catalyst for revisiting the foreign ownership restriction of the 1927 statute was the international conglomerate International Telephone and Telegraph. ITT had several alien directors and various alien officers.²⁶⁹ Nonetheless, through subsidiaries ITT controlled four U.S. companies outright—the Postal Telegraph & Cable Corporation, the Commercial Cable Co., All-America Cables, Inc., and Mackay Radio and Telegraph Company—and held a managing interest in another, Commercial Pacific Cable Co.²⁷⁰ ITT was technically in compliance with section 12 of the Radio Act of 1927 because its subsidiaries all satisfied the foreign ownership requirements.

Nonetheless, it was clear to Congress and the Navy that ITT was dodging the intent of the foreign ownership restrictions

267. *Id.*

268. *See, e.g.*, S. REP. NO. 1004, 72d Cong., 2d Sess. (1932); 72 CONG. REC. 8052 (1930).

269. *H.R. 8301 Hearings*, *supra* note 260, at 214.

270. *Id.* at 213.

in the Radio Act of 1927. The Navy considered ITT's ownership structure a threat to national security. To counter that threat, Captain Hooper, now Director of Naval Communications, spearheaded an aggressive lobbying effort to close the loophole in section 12 of the 1927 statute by extending foreign ownership restrictions to include holding companies. In congressional testimony in 1932, Hooper expressed the Navy's disapproval of ITT's actions:

Now we find that International Telephone & Telegraph has circumvented the intent of the law by operating as a holding company, with subsidiaries, among which their radio subsidiary actively complies with the law. I fail to see how this can be proper because if a holding company owns the subsidiary it dominates every act of the subsidiary.²⁷¹

Hooper claimed that World War I taught that, to promote readiness for a future war, *no* alien influence in American commercial communications should be tolerated.²⁷² In 1934, he told Congress:

That the communication facilities of a nation are vital to the nation's welfare is universally recognized. A natural corollary of that truth is that the communication facilities of a nation must be controlled and operated exclusively by citizens of that nation, and entirely free from foreign influ-

271. *Id.* at 166.

272. *To Amend the Radio Act of 1927: Hearings on H.R. 7716 Before the Sen. Comm. Interstate Commerce*, 72d Cong., 1st Sess. 16, 31-33 (1932) [hereinafter *H.R. 7716 Hearings*]; *Federal Communications Commission: Hearings on S. 2910 Before the Sen. Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 166, 170-71 (1934) [hereinafter *S. 2910 Hearings*].

ence.²⁷³

The divulgence of military secrets to domestic companies in peacetime was necessary, Hooper argued, so that American commercial radio could be fully and efficiently converted to a war effort on short notice.²⁷⁴ The only way to ensure such readiness for war on the part of America's communication network—short of government ownership, which the Navy still advocated²⁷⁵—was through establishing a synergistic relationship between the Navy and private industry. Hooper wanted a relationship predicated on the Navy's ability to entrust the U.S. wireless industry with vital military secrets. He described his vision to Congress:

While the radio communication operated by the Navy in peace time is sufficient for peacetime need, it would be inadequate in time of war and would have to be augmented by the facilities of commercial radio companies. These additional facilities, like those normally operated by the Navy, must be able to pass from peace to war status at a moment's notice.

For efficient operation in war there must be training and indoctrination in peace. Such training and indoctrination must involve the disclosure of military secrets Such secrets may not be divulged to any company, or to individuals of any company regarding which the least doubt can be entertained as to the citizenship, patriotism, and loyalty of any of its officers or personnel.²⁷⁶

273. *Id.* at 170.

274. *Id.*

275. *Id.* at 166.

276. *Id.* at 170–71.

Despite his relentless efforts, Hooper at first made little progress in persuading Congress to embrace his vision of the military-industrial complex.

Ironically, ITT served not only as the catalyst and the target for these reform initiatives, but also as the greatest obstacle to their enactment. In 1932, approximately 90 percent of its outstanding shares were controlled by Americans,²⁷⁷ and only four of ITT's twenty-three directors and two of its twenty-two officers were foreigners.²⁷⁸ The remaining directors and officers were American. In short, ITT, though an international conglomerate, was still a predominantly American company. As such, Congress, though sensitive to the Navy's national security arguments for nationalizing wireless communications, was wary of enacting any measure that would harm ITT's ability to operate internationally. Although ITT was a private corporate entity, Congress was well aware that it was better that international communications be controlled by an American company, with a minority foreign ownership stake, than by another nation. Senator White from Maine, ITT's champion in the Senate, sounded this warning during consideration of the 1932 initiative to require that all directors and officers of holding companies with controlling interests in U.S. wireless companies be American citizens:

I think it would be a grievous hardship for them, and I think of even more importance it would be a grievous harm to the communications interests of the United States as a whole, and the people of the United States if this communication company should be deprived of these facilities . . . It might cost this American company its

277. *S. 2910 Hearings*, *supra* note 272, at 126-27.

278. *Hearings on H.R. 7716*, *supra* note 272, at 39-40.

entire foreign setup in some countries that might be affected by it.

I think we should all agree that we would much prefer that there were none of these foreign directors but I think that weighs but a feather against the tremendous advantage of having this company maintain its radio services throughout the world and maintain for us here in this country the competitive services which would result from their system.²⁷⁹

Frank C. Page, ITT's vice president also warned the Senate in testimony on the 1932 bill that American influence in international telecommunications would diminish if Congress enacted Hooper's prohibition on foreign directors and officers, and that other nations would likely retaliate:

If we get rid of our directors, there is just as much national feeling in South America and in the rest of the world as there may be anywhere else, and it is absolutely certain . . . that those countries will retaliate against our companies in the foreign field where we are carrying on American communications. It is a problem which we would have to face if this bill . . . is passed as it is now written.²⁸⁰

Added to these concerns were the antitrust implications of forcing ITT to divest its holding in U.S. communications companies. ITT was RCA's only significant competitor. If forced to leave the market, RCA would have a virtual monopoly over international wireless. And increasing RCA's market

279. *H.R. 7716 Hearings*, *supra* note 272, at 16-17.

280. *Id.* at 42.

power in this manner would increase its exposure under U.S. antitrust law,²⁸¹ which would have the counterproductive effect of undermining America's efforts to influence the international radiocommunications. Senator White advanced this unpleasant possibility in opposing the 1932 bill:

I think to deprive [ITT] of the licenses of its subsidiaries would be taking the most far-reaching step toward a monopoly of radiocommunications in the international field that we could take [T]he great competitor in the international field is the Radio Corporation of America. One of the underlying purposes of the 1927 law was to preserve competition in the communications field, and there were various efforts made to insure that there should be competition.

I personally feel that to write this language which is here proposed into law would be a tremendous backward step and that we would be in large measure abandoning the original conception of the United States law with respect to this matter of monopoly. We would be doing what I think is a great harm to an American communication company, and we would be very closely verging on monopolistic control over international communication.²⁸²

To these warnings, ITT added that enactment of the 1932 bill would erase the investment of "over 90,000 Americans" in ITT's radio enterprises.²⁸³ During this time, ITT also foot-dragged skillfully in the face of congressional pressure to

281. *Id.* at 33-34.

282. *Id.* at 16.

283. *Id.* at 42.

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propose its own solution to the controversy.²⁸⁴ The foreign ownership restrictions would remain unchanged for another two years.

284. ITT's president, Sothenes Behn, exasperated Clarence Dill, the chairman of the Senate Committee on Interstate Commerce, during testimony in 1932 to extend the 1927 act's foreign ownership restrictions to holding companies:

MR. BEHN. I beg pardon, Mr. Chairman. I do not say I am objecting to applying it; I just want to work out a formula so that it can be done practically without causing damage.

THE CHAIRMAN. You have known that this provision has been up here for the last 2 or 3 years. You have said before this committee previously that you were gradually working something out; now you come before us and tell us that it is absolutely impractical, that it cannot be done; that you must go out of business if anything of this kind is put in.

MR. BEHN. Mr. Chairman, if you will allow me, I said impractical in its present form, and that we are willing to cooperate to find a form that will reach holding companies.

THE CHAIRMAN. We have been trying to get you to cooperate for 3 or 4 years. Four years ago we had this up.

MR. BEHN. We have always been willing to appear and submit our views.

THE CHAIRMAN. But you do not say yet what percentage of foreign ownership you can approve in the law.

MR. BEHN. With your permission, Mr. Chairman, I will submit a memorandum on this question.

MR. CHAIRMAN. Do you not know?

MR. BEHN. No; I am not prepared to answer that now.

MR. CHAIRMAN. After all these years' consideration you are unable to give us an opinion?

MR. BEHN. This covers a legal phase that has to be considered very carefully.

MR. CHAIRMAN. Well, go ahead.

S. 2910 Hearings, supra note 272, at 126-27.

SECTION 310 OF THE
COMMUNICATIONS ACT OF 1934

Although Congress in 1934 focused primarily on President Franklin Roosevelt's proposal to create a Federal Communications Commission,²⁸⁵ reform of the foreign ownership provisions was ripe. Challenging each other were the Navy's national security interests and America's economic interests in the global communications market. ITT was thought to provide the U.S. a unique platform from to influence international wireless communications; thus any constraint on ITT's ability to operate in the international arena would not only harm the company, but also compromise America's strategic interests.

In section 310 of the new Communications Act of 1934, Congress expanded the foreign ownership restrictions in the Radio Act of 1927 to apply to holding companies.²⁸⁶ Congress hoped that its solution would satisfy the Navy while not impairing ITT's international communications business.²⁸⁷ Yet the reasoning for why the amendment would mutually satisfy the Navy and ITT was obscure from the official statements of the key figures behind the 1934 legislation.

Arguing that "[t]he holding company system has made such legislation necessary,"²⁸⁸ Clarence Dill, chairman of the Senate Committee on Interstate Commerce, offered as the solution "a provision that none of the officers of the company shall be foreigners, that not more than one fifth of the capital

285. Message from the President of the United States Recommending That Congress Create a New Agency to be Known as the Federal Communications Commission (____, 1934), *reprinted in* ____ PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1934, at ____ (Samuel Rosenman ed., 1950).

286. *S. 2910 Hearings*, *supra* note 272, at 130 (statement of Sen. White); Joint Board, J.B. no. 319 (serial no. 522) (Jan. 19, 1934), *reprinted in S. 2910 Hearings*, *id.* at 167-68 (Army-Navy Joint Board memorandum supporting Hooper proposals).

287. S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934).

288. 78 CONG. REC. 8825 (1934).

stock shall be owned and voted by foreigners, and that not more than one fourth of the directors shall be foreigners.”²⁸⁹ ITT had previously fought H.R. 7716 in 1932, which would have been harsher in the sense of forbidding *any* director to be a foreigner, on the grounds that it would impair the company’s ability to operate in foreign countries, to the ultimate detriment of broader American interests. So it shed no light on why it had become the case by 1934 that, as Dill asserted, the new provision directed at holding companies, which was more permissive than H.R. 7716 only to the extent that it allowed 25 percent of the holding company’s board to be foreign, would not impede the ability of “our international communication companies”—namely, ITT—“to compete with companies in foreign countries.”²⁹⁰

Nor was it any clearer why the Navy should like this amendment. Dill’s argument for why the new provision “amply safeguarded . . . the American communications service,” was really an argument for why the holding company provision was unnecessary in the first place: “[A]fter all, if an emergency shall arise and the country shall go to war, the President will have power under the law to seize all communication companies, and have absolute control of all communication companies with facilities in the United States.”²⁹¹ Congress had already granted the President this power twenty-two years earlier when enacting section 2 of the Radio Act of 1912,²⁹² and President Wilson had invoked the power when the U.S. declared war on Germany on April 6, 1917.²⁹³ In short, Senator Dill’s explanation of the incremental benefits to ITT and the Navy of the holding company provision was no explanation at all.

289. *Id.*

290. *Id.*

291. *Id.*

292. 37 Stat. 302, § 2 (1912).

293. Exec. Order (Apr. 6, 1917), *reprinted in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8241.

The foreign ownership restrictions in section 310 of Communications Act of 1934 added two notable limitations to the restrictions already present in section 12 of the Radio Act of 1927. First, section 12(d) of the 1927 statute had prohibited the grant of licenses to any company “of which more than one-fifth of the capital stock may be voted by aliens.”²⁹⁴ Section 310(a)(4) of the 1934 statute qualified this restriction to apply only to “one-fifth of the capital stock . . . *owned of record* or voted by aliens.”²⁹⁵ The added phrase “owned of record” sought to “guard against *actual* alien control, and not the mere *possibility* of alien control.”²⁹⁶ In Senator Dill’s words, “the only thing a company can be held to is what is on the books.”²⁹⁷ Corporations would be permitted to rely upon record ownership without having to confirm the extent of foreign ownership through independent investigation.

Second, and more important, Congress directly addressed, in section 310(a)(5), foreign participation in holding companies. H.R. 7716 was the blueprint. It originally proposed in 1932 to relax the foreign ownership restrictions in section 12 of the Radio Act of 1927 by permitting the grant of a license to a corporation with alien directors and officers if aliens held no more than one-fifth of those positions. The logic of changing the provision concerning officers and directors, from total exclusion of aliens under section 12 of the 1927 Act to four-fifths exclusion of them under H.R. 7716, was to create symmetry with the existing requirement that no more than one-fifth of the holding company’s capital stock be voted by aliens.²⁹⁸

Senator White criticized this aspect of the House’s bill as “a distinctly backward step from the standard of what I will

294. 44 Stat. 1162, § 12(d) (1927).

295. 48 Stat. 1086, § 310(a)(4) (1934) (emphasis added).

296. S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934) (emphasis added).

297. S. 2910 Hearings, *supra* note 272, at 122–25.

298. S. REP. NO. 1004, 72d Cong., 2d Sess. 10–11 (1932).

call Americanism, written into the 1927 law," and he urged that "the whole section should be stricken out and that the entire matter should go to conference."²⁹⁹ White saw the holding company provision as being "aimed at a particular situation and a particular American corporation."³⁰⁰ Its intent, he argued, was to present ITT "a most acute and embarrassing situation" that would "force either the relinquishment of the licenses by the subsidiaries of this company or the ousting of all foreign officers and directors of the parent company."³⁰¹

As a compromise, a House amendment retained the 25 percent benchmark with respect to directors of a corporate licensee, barred aliens from serving as officers, and added language placing similar limitations on holding companies.³⁰² This

299. 76 CONG. REC. 3769 (1933).

300. *Id.*

301. *Id.*

302. In relevant part, the substitute provision read:

The station license required hereby shall not be granted to or held by—

(d) Any controlling or holding company, corporation, or association, of which any officer or more than one-fifth of the directors are aliens, or of which more than one-fifth of the capital stock may be voted by aliens, their representatives, or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country;

(e) Any corporation or association controlled by, or subsidiary to a corporation or association, of which any officer or more than one-fifth of the directors are aliens, or of which more than one-fifth of the capital stock may be voted by aliens, their representatives, or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

H.R. REP. NO. 2106, 72d Cong., 2d Sess. 2 (1933). The House report ex-

compromise substitution made in H.R. 7716, however, only became section 310(a) after the conference committee inserted a clause at the end of the holding company provision giving the new FCC discretion to permit alien participation in holding companies beyond the statutory benchmarks.³⁰³ As enacted, section 310(a)(5), later renumbered section 310(b)(4), provided that no license was to be granted to or held by

any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after January 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.³⁰⁴

The proviso would empower the FCC to grant licenses to subsidiaries of holding companies with alien officers and more than one-fourth alien directors, or with more than one-fourth alien ownership. The conference report merely notes that the legislation gives the FCC this discretion.³⁰⁵ Nonetheless, the

plained that the amendment "permit[s] a station license to be granted to or held by a company of which not more than one-fifth of the directors are aliens. It also broadens the present law so as to make the inhibition against licenses being granted to or held by aliens, or a company, corporation, or association of which any officer or more than one-fifth of the directors are aliens, or of which more than one-fifth of the capital stock may be voted by aliens, also apply to any controlling, holding, or subsidiary company, corporation, or association." *Id.* at 5-6.

303. 78 CONG. REC. 10978 (1934).

304. 48 Stat. 1086, § 310(a)(5) (1934).

305. H. REP. NO. 1918, 73d Cong., 2d Sess. 48-49 (1934). *See also* 78

decision by Congress to grant that discretion is consistent with the larger conclusion that the legislators ultimately agreed with Senator White that foreign ownership and control of holding companies whose subsidiaries hold radio licenses could actually advance U.S. interests rather than threaten them.³⁰⁶

PEARL HARBOR

Within seven years, the fortified foreign ownership restrictions in the Communications Act of 1934 revealed their irrelevance to the protection of national security. Using U.S. radio common carriers, Japanese diplomats transmitted encrypted military intelligence to and from the U.S., including information on ship movements at Pearl Harbor in preparation for the surprise attack on December 7, 1941.³⁰⁷

On March 27, 1941, Ensign Takeo Yoshikawa arrived in Honolulu to serve as the Imperial Japanese Navy's espionage agent.³⁰⁸ Rotating among the U.S. radio common carriers, he continuously reported to the Japanese Navy all ship movements in Pearl Harbor.³⁰⁹ Yoshikawa's report that the U.S. fleet was still in port was the last message that the Japanese consulate in Honolulu sent before the attack. Time stamped "1941 Dec 6 pm 6 01" by RCA's office in Honolulu,³¹⁰ his encrypted message read:

(1) On the evening of the 5th, the battleship *Wyoming* and one sweeper entered port. Ships at anchor on the 6th were: 9 battleships, 3 mine-

CONG. REC. 10988 (1934).

306. See S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934).

307. DAVID KAHN, *THE CODEBREAKERS* 42-53 (London, Weidenfeld & Nicolson 1974).

308. *Id.* at 13.

309. *Id.*

310. *Id.* at 52.